Supreme Court, U.S.
FILED
OCT 12 2001
CLERK

(2)

No. 01-64

In the Supreme Court of the United States

OCTOBER TERM, 2001

JEFFREY HERSON, DBA BYNX and DBA OUTDOOR MEDIA DIMENSIONS, INC.,

Petitioners,

v.

DRIVER AND MOTOR VEHICLE SERVICES DIVISION (DMV),

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

---

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MICHAEL D. REYNOLDS**
Solicitor General
JANET A. METCALF
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

23p

QUESTIONS PRESENTED

1. Whether the Court should deny the petition when the state court of last resort has not ruled on any of the constitutional questions presented by petitioners, when the state statutes petitioners cite have since been amended, and when petitioners do not claim that provisions such as those of the state's former statutes are in force elsewhere.

2. Whether the Court should deny the petition when the state appellate court's interpretation of the state statutes is at odds with petitioners' and when petitioners' arguments are based solely on their own statutory interpretation.

3. Whether the Court should deny the petition when petitioners claim that there are direct conflicts between the state appellate court's decisions and decisions from this Court and from other federal courts of appeal, but when those conflicts are all illusory and disappear on closer examination.

TABLE OF CONTENTS

Questions Presented i

Statement of the Case 1

Reasons Why the Petition Should Be Denied 4

I. Petitioners complain about decisions rendered by the state's intermediate Court of Appeals; the state Supreme Court has never ruled on these issues; in addition, the pertinent statutes have since been amended. 4

II. Petitioners' arguments depend on erroneous readings of state law. 11

III. On closer examination, the decisional conflicts that petitioners seek to identify disappear. 15

A. The supposed *Metromedia* conflict 15

B. The claimed conflict with this Court's decision in *FW/PBS, Inc* 17

Conclusion 18

TABLE OF AUTHORITIES

Cases Cited

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 16

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).....10

Conn v. Gabbert, 457 U.S. 286 (1999).....5

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 17

Herson v. DMV, 157 Or. App. 683, 971 P.2d 492 (1998), *review denied* 332 Or. 56 (2001).....1, 2, 4, 16

Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985) 15

Metromedia, Inc. v. San Diego, 543 U.S. 490 (1981).....14, 15 16

National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988).....15

National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), *cert denied* 504 U.S. 931 (1992).....15

National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.), *cert denied* 498 U.S. 852 (1990).....15

One Thousand Friends of Oregon v. Bd. of Co. Comm., 284 Or 41, 584 P.2d 1371 (1978).....8

Outdoor Media Dimensions, Inc. v. State of Oregon, 150 Or. App. 106, 945 P.2d 614 (1997), *aff'd on other grounds* 331 Or. 634, 20 P.3d 180 (2001)..... passim

Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993) 17, 18

Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994) 15

State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982) 7

Constitutional Provisions

Or. Const. Article I, section 8 7

Statutory Provisions

42 U.S.C. section 1983 5

Or. Laws 1999, ch. 877 1

Or. Rev. Stat. § 377.710(22) 2

Or. Rev. Stat. § 377.725(1) 2, 11

Or. Rev. Stat. § 377.725(2) 14

Or. Rev. Stat. § 377.735(1) (1991) 9

Or. Rev. Stat. § 377.735(1) (1999) 9

Or. Rev. Stat. §§ 377.700 *et seq.* 1

Or. Rev. Stat. 377.705(14) 14

Other Authorities

U.S. Supreme Court Rule 10(b) 7

STATEMENT OF THE CASE

This case involves the 1991 version of the Oregon Motorist Information Act (OMIA), ORS 377.700 *et seq.* (Pet. 2).[1] The 1991 statutes implicitly distinguished between on-premises and off-premises (or "outdoor advertising") signs, allowing on-premises signs without a permit, but allowing off-premises signs only with a permit. *See Outdoor Media Dimensions, Inc. v. State of Oregon,* 150 Or. App. 106, 108–09, 945 P.2d 614 (1997) (describing 1991 statutory scheme), *aff'd on other grounds* 331 Or. 634, 20 P.3d 180 (2001).

This case began when the state agency notified petitioners that several of their billboards or "outdoor advertising" signs, which had been erected along state highways without a permit, violated the OMIA. The notices warned that the signs would be removed unless petitioners requested a hearing. (Final Order 3, 7–8; DMV Ex. 3). Petitioners timely requested a hearing and, following a contested case proceeding, the agency issued its final order, determining that petitioners' signs violated the statutes and ordering their removal. *Herson v. DMV,* 157 Or. App. 683, 685, 971 P.2d 492 (1998), *review denied* 332 Or. 56 (2001).

Petitioners then sought judicial review before the state Court of Appeals. Before that court, petitioners argued *inter alia* that the 1991 version of the OMIA was unconstitutional because it violated the First and Fourteenth Amendments.[2] Petitioners claimed that the OMIA was unconstitutional be-

---

[1] As explained below, the statutes have since been amended and were last amended in 1999. Or. Laws 1999, ch. 877.

[2] Petitioners also contended that one of their signs did not violate the OMIA because it was not an "outdoor advertising" sign within the meaning of the statute. (App. Br. 38-39). Petitioners do not raise that claim in their petition filed with this Court.

cause it supposedly favored commercial speech over non-commercial speech, because it allegedly permitted some non-commercial speech where other non-commercial speech was prohibited, and because it did not provide for a prompt administrative decision on an application for a permit. (Pet. 6). Relying on its decision in an earlier case involving similar challenges, the state Court of Appeals rejected those claims. In this case, the court simply noted that it already had decided those issues in its earlier *Outdoor Media Dimensions* decision and that it "adhere[d] to those rulings" here. *Herson,* 157 Or. App. at 685, citing *Outdoor Media Dimensions Inc.,* 150 Or. App. 106. Petitioners then sought review in the state Supreme Court, which denied review without comment. *Herson,* 332 Or. 56.

In its prior *Outdoor Media Dimensions* decision, the state appellate court rejected claims similar to those advanced in the petition filed in this case.[3] Interpreting the state statutes, the court held that the OMIA does not distinguish between commercial and non-commercial speech nor "favor commercial over non-commercial speech[.]" 150 Or. App. at 114. Instead, the pivotal distinction drawn in the statutes is the distinction between on-premises and off-premises (or "outdoor advertising") signs. While off-premises signs require a permit, and on-premises signs do not, ORS 377.725(1) (Pet. 2–3), both on- and off-premises signs can contain either commercial or non-commercial speech. ORS 377.710(22).[4] Thus, as the

---

[3] Outdoor Media Dimensions was the plaintiff in that case. Outdoor Media Dimensions also is one of the petitioners in this case.

[4] Under the 1991 version of the statute, off-premises or "outdoor advertising" signs are those that advertise "[g]oods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located" or "[f]acilities not located on the premises on which the sign is located."

state court held, the OMIA does not favor commercial over non-commercial speech. An on-premises sign can be either commercial or non-commercial in nature, and an off-premises sign requires a permit whether it is non-commercial or commercial. *Outdoor Media Dimensions Inc.*, 150 Or. App. at 114 ("the OMIA's on-premises exception applied equally to commercial and non-commercial billboards").

In *Outdoor Media*, petitioners claimed that the OMIA allows some non-commercial speech where it prohibits other non-commercial speech. The court disagreed with that reading of the state statutes. 150 Or. App. at 116–17. The court concluded that "the OMIA's on-premises/off-premises distinction" does not impose "a content-based restriction on speech[.]" *Id.* at 117. The court held that "it is not the content, subject or viewpoint of [the sign's] message that determines whether a permit is required." *Id.*

Finally, the state Court of Appeals also disagreed with Outdoor Media's claim that the OMIA "is * * * flawed because it does not provide that the department must approve or deny an application for a relocation permit 'within a specified brief period' of time." 150 Or. App. at 120. The court held that "the OMIA's relocation and transfer provisions do not require the [state] department to review the content of a billboard's message, nor do they represent a legislative attempt to classify and restrict speech on the basis of content." *Id.* at 121. "[T]he OMIA's permit requirement is not content-based," the court concluded, "and the relocation and transfer provisions apply to all billboards, regardless of their messages." *Id.* at 122. Based on its reading of state law, the Court of Appeals rejected all of the plaintiff's challenges to the OMIA.

As explained in more detail below, on review the state Supreme Court found it did not need to decide the merits of these constitutional issues. Instead, the Supreme Court based

its decision on narrower and more case-specific grounds. *Outdoor Media Dimensions, Inc.*, 331 Or. at 654–57. To date, the state Supreme Court has never ruled on the constitutional issues raised in this petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioners complain about decisions rendered by the state's intermediate Court of Appeals; the state Supreme Court has never ruled on these issues; in addition, the pertinent statutes have since been amended.

In arguing that the state statutes are unconstitutional and that state court decisions conflict with those of other courts, including this one, petitioners rely on two decisions of the state Court of Appeals: the one reached in this case, and the one it rendered in its earlier *Outdoor Media* decision. (Pet. 1, 7–11). *Herson,* 157 Or. App. 683; *Outdoor Media Dimensions, Inc.*, 150 Or. App. 106. As discussed below, petitioners mischaracterize the basis for those decisions. Setting that point aside for the moment, it bears emphasis that petitioners' complaints are aimed solely at decisions rendered by the state's intermediate Court of Appeals. As noted above, the state Supreme Court has never resolved the issues that petitioners contend were wrongly decided by the Court of Appeals.

Petitioners contend (erroneously) that in the *Outdoor Media Dimensions* case the state appellate court upheld a statutory scheme that supposedly violated the First Amendment by favoring commercial over non-commercial speech and by permitting some non-commercial speech where other non-commercial speech was banned. (Pet. 7, 9–10). They also assert that the state's permit requirement for outdoor advertising signs violates due process. (Pet. 10–11). The state Court of Appeals resolved those issues, but on review the state Su-

preme Court did not. Instead, the court determined that it did not need to reach the merits of the issues.

Specifically, in *Outdoor Media* the state Supreme Court did not decide whether the OMIA violated the First Amendment. In that case, the plaintiffs brought claims under 42 U.S.C. section 1983, asserting violations of the First and Fourteenth Amendments. The court resolved the plaintiff's claims by concluding that the state had been entitled to summary judgment based on its defense of qualified immunity. *Outdoor Media Dimensions, Inc.,* 331 Or. at 655–57. That holding required the court to determine only that in 1993 and 1994, when the challenged state conduct had occurred, "the state of the law respecting the manner in which governments may regulate billboards without infringing on free speech rights" was "unsettled." *Id.* at 657. Because the law was unsettled, state officials had not "'violated clearly established * * * constitutional rights of which a reasonable person would have known.'" *Id.* at 656, quoting *Conn v. Gabbert,* 457 U.S. 286, 290 (1999) (internal quotation marks and additional citation omitted). Thus, the state Supreme Court did not need to, and did not, decide whether the OMIA violates the First Amendment. *Id.* at 657.

In *Outdoor Media,* the state Supreme Court also did not decide whether the permit requirement was an unconstitutional prior restraint, as petitioners claim. Rather than deciding the merits of that issue—as the Court of Appeals had, 150 Or. App. at 119–22—the state Supreme Court held that "[t]he problem with [the plaintiff's section 1983] argument relate[d] to causation." 331 Or. at 654. The court explained that:

> Plaintiff advances its argument in the context of plaintiff's claim for money damages under section 1983—damages that plaintiff alleges resulted from the state's violation of plaintiff's constitutional rights. Plaintiff,

> however, neither pleaded nor argued that the state's application of the OMIA's permit and hearing provisions *caused* plaintiff's alleged damages. To prevail on its section 1983 claim, plaintiff must prove that the asserted constitutional violation caused the damages that plaintiff seeks to recover. *See, e.g., Brower v. Inyo County*, 489 US 593, 599, 109 S Ct 1378, 103 L Ed 2d 628 (1989) (discussing requirements of proximate causation with respect to section 1983 claims).
>
> As noted, plaintiff's alleged damages do not derive from the lack of time limits under the OMIA for obtaining permits or judicial access. * * * Plaintiff does not argue that, had the state given it more time, plaintiff would have been able to secure a permit.
>
> On these facts, it is the validity of the permit requirement—which is not at issue respecting this alleged constitutional violation—and not the lack of time constraint, that we must address in deciding plaintiff's claim for monetary damages under section 1983. Plaintiff's prior restraint theory, therefore, is misplaced.

Id. at 654–55 (emphasis in original; footnote omitted).

Thus, in *Outdoor Media* the state Supreme Court did not reach or decide any of the issues that petitioners contend the Court of Appeals got wrong both in that case and in this one. Instead, after the Court of Appeals decisions in *Outdoor Media* and in this case, the state Supreme Court determined that it did not need to reach the merits of those issues in the *Outdoor Media* case. In this case, the state Supreme Court simply denied review. That court never has decided the issues raised by petitioners here.

Presumably, this Court could issue a writ even though the state court of last resort has not considered or decided the is-

sues. *But see* Rule 10(b) (writ may issue when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"). But the fact that the state's highest court has not ruled on the issues is a factor that should weigh against issuance of a writ. If the state Supreme Court had to decide the constitutional issues presented here, it might not construe the statutes in the same way that the state Court of Appeals did. The court also might decide the case based on a provision of the state constitution, such as Article I, section 8, of the Oregon Constitution,[5] without relying on federal law. Alternatively, even if the court reached the federal constitutional issues it might not agree with the appellate court's decision on those constitutional issues. Thus, the fact that the state Supreme Court has not ruled on the issues—and that no one can be certain how and on what basis it would rule if directly confronted with the issues—weighs against granting the petition.

That same point can be made by approaching it from a somewhat different angle. Among the petitioners in this case is Outdoor Media Dimensions, one of petitioner Jeffrey Herson's "dbas." Outdoor Media Dimensions was the plaintiff in the state-court *Outdoor Media Dimensions* case. One notable feature of the petition filed with the Court in this case is that its complaints are directed principally at the Oregon Court of Appeals *Outdoor Media Dimensions* decision, rather than at

---

[5] Article I, section 8, provides that: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The state Supreme Court has adopted its own unique methodology for analyzing challenges brought under this state constitutional provision. *See, e.g. State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) (outlining that methodology).

the decision rendered by that court in this case. Presumably, petitioners did not seek the issuance of a writ in the *Outdoor Media Dimensions* case because ultimately the state Supreme Court did not reach the merits of or endorse the rulings that petitioners contend the state appellate court got wrong. Had Outdoor Media Dimensions sought this Court's review in the *Outdoor Media* case, the state would have responded by noting that the petitioner was challenging the intermediate court's decision only, not the state Supreme Court's, and by emphasizing that the state Supreme Court resolved the case on different grounds. The petition filed in this case represents little more than an indirect attempt to evade that response. The attempt should not prove successful simply because petitioners have followed an indirect route.

It is apparent that petitioners' real complaint is focused on the state Court of Appeals *Outdoor Media Dimensions* decision, not on this case. In this case, the court simply said that it "adhere[d] to [its earlier] rulings." (Pet, App. 2). The state Supreme Court's decision denying review in this case does not signal that the court agrees with the Court of Appeals rulings on the constitutional issues raised here. *See 1000 Friends of Oregon v. Bd. of Co. Comm.*, 284 Or 41, 44, 47, 584 P.2d 1371 (1978) (denial of review does not imply that Court of Appeals decision is correct). Although the court did not give a reason for its decision to deny review in this case, the change in the pertinent state statutes may well have been a factor in the court's decision.

In sum, because the state Supreme Court has not endorsed the appellate court's decision on the constitutional issues raised here, it would be premature for this Court to review the conclusions reached by the state's intermediate appellate court. The fact that the state Supreme Court has not ruled on these issues is a factor that weighs against granting the petition. That is especially so because the state statutes have since

been amended, and because petitioners do not claim that other states or municipalities have followed the decisions of Oregon's Court of Appeals or that statutes such as the 1991 version of the OMIA are common elsewhere.

As noted above, this case involves the 1991 version of the OMIA that has since been amended. At least in some respects, petitioners' arguments focus on portions of the 1991 statutes that are no longer in effect. In particular, both in their petition and in their briefs filed in state court, petitioners have relied on the exemptions that were set out in ORS 377.735(1) (1991). (*See, e.g.,* Pet. 3–5, 7, App. 2–3).[6] Those exemptions provide the basis for their assertion that the statutes favor commercial over non-commercial speech and permit some, but not all, non-commercial speech on off-premises signs. The 1999 amendments to the OMIA eliminated almost all of those exemptions. The only signs now exempted are on-premises signs (which implicitly were exempted under the 1991 statutes, and which are exempted without regard for content), signs of governmental units, and certain temporary signs on private property. ORS 377.735(1) (1999).[7]

---

[6] The 1991 version of the statute is set out in the petition. (Pet. 3–5).

[7] ORS 377.735(1) (1999) provides that:

(1) If applicable federal requirements as of October 23, 1999, are met, the permit requirements of ORS 377.700 to 377.840 do not apply to:

(a) Signs of a governmental unit, including but not limited to traffic control or regulatory devices, legal notices or warnings.

(b) A temporary sign on private property if:

(A) The sign does not exceed 12 square feet;

(B) The sign is not on a permanent base;

(C) The sign does not remain in place for a period of more than 60 days in a calendar year, except that a sign erected by a

Footnote continued...

The change in the statutes does not mean that petitioners' claims are moot, *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288–89 & n. 10 (1982) (voluntary repeal of law does not necessarily moot challenges to it), or that this Court could not issue a writ. The change in the statutes is simply another factor that weighs against allowing the petition. The statutory exemptions on which petitioners focus at least part of their argument are no longer in the state statutes. If those exemptions were problematic or troubling in any respect, they are no longer in force. Petitioners do not claim that such exemptions are a common feature in similar statutes or that there is some other pressing reason why this Court should consider the issues in this case despite the change in the state statutes. This Court has little reason to issue a writ to decide only this individual case that is based on state statutes that have since been recast.

In sum, because petitioners rely on cases from the state's intermediate Court of Appeals and on rulings that have not been reviewed on their merits by the state Supreme Court, and because petitioners challenge state statutes that have since been amended, the petition should not be allowed in this case.

(...continued)

resident on the resident's residential property may remain in place for longer than 60 days in a calendar year;

(D) No person receives compensation for displaying the sign; and

(E) The sign complies with ORS 377.720 [setting out lighting, location, and other requirements].

(c) On-premises signs.

II. Petitioners' arguments depend on erroneous readings of state law.

Petitioners' argument that the OMIA violates the First Amendment is based on the apparent assumptions that the statutes give greater protection to commercial than to non-commercial speech and that the statutes permit some non-commercial speech where they ban other non-commercial speech. (Pet. 7). Petitioners do not clearly explain why they believe the OMIA favors commercial speech or why they contend it treats some non-commercial speech more favorably. Instead, they simply assert that the OMIA makes those distinctions. Both of their assumptions about the OMIA, however, appear to be based on a misreading of state law that conflicts with the state court's interpretation of the statutes.

As noted above, the pivotal distinction drawn in the OMIA is the distinction between on-premises and off-premises (or "outdoor advertising") signs. Off-premises signs require a permit, while on-premises signs do not. ORS 377.725(1). Under the 1991 statutes, both on- and off-premises signs could be either commercial or non-commercial.[8] The Oregon Court of Appeals has held, as a matter of statutory interpretation under state law, that "the

---

[8] The same is true with respect to the 1999 version of the statutes. The 1999 version of the OMIA defines an "on-premises" sign as one that is "designed, intended or used to advertise, inform or attract the attention of the public as to" "[a]ctivities conducted on the premises on which the sign is located" or "[t]he sale or lease of the premises on which the sign is located." ORS 377.710(22) (1999). An off-premises or "outdoor advertising" sign is one "designed, intended or used to advertise, inform or attract the attention of the public to" "[g]oods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located," "[f]acilities not located on" those premises, or "[a]ctivities not conducted on" the premises. ORS 377.710(23) (1999).

OMIA does not favor commercial over non-commercial speech" because "the OMIA's on-premises exception applies equally to commercial and non-commercial billboards." *Outdoor Media Dimensions Inc.*, 150 Or. App. at 114. Petitioners' argument ignores, and is at odds with, this interpretation of state law.

As an example of the OMIA's supposed preference for commercial over non-commercial speech, petitioners assert that:

> [a] sign at the site of a restaurant with a commercial message of "Hamburgers Sold Here" is not an outdoor advertising sign and, hence, may be displayed without a permit. However, a sign at the same site with the noncommercial message of "Attend First Baptist Church" or "Ban Abortions" is an outdoor advertising sign and, hence, [may be] banned without a permit.

(Pet. 7). That assertion appears to be factually correct, as far as it goes, but it may be intended to suggest a distinction that the state statutes do not make. Under the OMIA, a sign hawking hamburgers cannot be displayed off-premises at a church (unless the church is holding a hamburger feed) and one inviting church attendance similarly cannot be displayed off-premises at a hamburger stand. But the sign urging church attendance can be displayed on church premises,[9] the "ban abortions" sign can be posted at the headquarters of the Ban Abortions Committee, and the hamburger stand also can advertise its wares onsite. As the state appellate court has held, the statutory distinction is not one made between commercial

---

[9] In *Outdoor Media*, the state court specifically concluded that "a sign reading 'Attend First Baptist Church,' posted at the church," would be a permissible on-premises sign. 150 Or. App. at 115 n. 10.

and non-commercial speech, but between on-premises and off-premises signs.

The statutes also do not favor some non-commercial speech over other non-commercial speech, as petitioners suggest. (Pet. 7). As noted, the Oregon Court of Appeals has rejected such a claim based on its reading of state law. *Outdoor Media*, 150 Or. App. at 116–17. Petitioners give the following example of the favoritism they contend is created by the statutes.

> [A]t a vacant lot, under the exemption contained in ORS 377.735(1)(g),[10] a sign with the noncommercial message of "Attend the High School Back to School Night on October 6" may be displayed without a permit, but the noncommercial message of "Attend First Baptist Church" is banned without a permit.

(Pet. 7). Petitioners may be correct about those two signs (assuming that the school sign is posted for no more than two weeks), but the statutory distinction is not one made between different types of non-commercial speech, as petitioners appear to suggest. Instead, the distinction made is one between temporary signs, posted for no more than two weeks, and more permanent ones. Again, petitioners misread state law and their interpretations of the state statutes conflict with those of the state court.

Petitioners also contend that the "permit requirement" in the OMIA amounts to an impermissible prior restraint. (Pet. 8–9). Petitioners' argument again appears to be based on a mistaken interpretation of state law. Petitioners' argument

---

[10] That 1991 statute provided for an exception for "[s]igns maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization."

seems to be based on the view that obtaining a permit is an initial hurdle that must be cleared in order to erect or maintain an "outdoor advertising" or off-premises sign. Based on that view, petitioners argue that the OMIA does not provide adequate due process because the permitting decision need not be made in any specified amount of time. (Pet. 10).

That argument misapprehends the nature and purpose of the permit requirement under the OMIA, which operates as a numerical and geographic limitation on off-premises "outdoor advertising" signs. Such signs are permitted only in commercial and industrial zones, and the number of signs is effectively limited by the number of outdoor advertising signs in existence in 1975. *See Outdoor Media Dimensions Inc.*, 150 Or. App. at 117 ("ORS 377.705(14) effectively places a cap on the number of highway billboards in Oregon by denying permits for the installation of new billboards after June 12, 1975"). Unless an outdoor advertising sign fits within those geographic and numerical limitations, a permit can be obtained only by transfer from one person to another. ORS 377.725(2). This is not a permit requirement in the usual sense. Petitioners' inability to get a permit is not due to any delay in the permitting process, but to the fact that their signs are off-premises ones that are in the wrong places and that do not fit within the terms of the act's grandfather provisions.

In sum, petitioners' arguments are based on mistaken interpretations of state law that are at odds with the interpretation given to those statutes by the state appellate court. When the state court's interpretations of state law are substituted for petitioners', the main props of their arguments fall away. In addition, the state court's reading of state law would impede this Court's ability to reach and decide the constitutional issues petitioners urge on the Court. The fact that petitioners' arguments are at odds with the state court's reading of state

law is another factor that counsels against the issuance of a writ in this case.

III. On closer examination, the decisional conflicts that petitioners seek to identify disappear.

A. The supposed *Metromedia* conflict

Petitioners argue that there is a "direct conflict" between some of the federal circuit courts of appeal and the Oregon court "as to whether the test set forth by Mr. Justice White in [the plurality opinion in] *Metromedia* * * * is an appropriate test under the First Amendment." (Pet. 9). In addition to the Oregon Court of Appeals decisions cited and discussed above, petitioners cite decisions from the third and fourth circuits that supposedly conflict with cases from the first, second and ninth circuits. (Pet. 9).

Petitioners do not clearly identify what they mean by "the test set forth" in the plurality opinion in *Metromedia.* As a general matter, "[t]he *Metromedia* decision was badly splintered, producing five separate opinions." *Rappa v. New Castle County,* 18 F.3d 1043, 1057 (3d Cir. 1994), describing *Metromedia, Inc. v. San Diego*, 543 U.S. 490 (1981). *See also Outdoor Media Dimensions Inc.,* 150 Or. App. at 113–14 (quoting the Third Circuit's decision in *Rappa* and making the same point).

Some aspects of the *Metromedia* plurality opinion seem rather uncontroversial, however, and petitioners appear to be relying on those aspects of the decision. (Pet. 7, 9–11). For example, every supposedly conflicting case cited by petitioners, including the Oregon decisions, either accepts that commercial speech cannot be favored over non-commercial speech or finds that the law under examination does not create any such favoritism. *Rappa*, 18 F.3d at 1056 (commercial speech not favored); *Matthews v. Town of Needham,* 764 F.2d 58, 61 (1st Cir. 1985) (relying on *Metromedia* for proposition

that commercial speech cannot be favored over non-commercial speech); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556 (2d Cir.), *cert denied* 498 U.S. 852 (1990) (same); *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1169 (4th Cir. 1991), *cert denied* 504 U.S. 931 (1992) (rejecting claim that terms "commercial" and "non-commercial" are vague); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (total ban on off-premises commercial billboards is permissible under *Metromedia;* commercial speech not favored over non-commercial).[11]

The Oregon cases are not to the contrary. In *Outdoor Media*, the court concluded that "the OMIA does not favor commercial over non-commercial speech." 150 Or. App. at 114. In the present case, the Oregon court simply relied on its earlier decision. *Herson*, 157 Or. App. at 685. Thus, although petitioners insist that there is a "direct conflict" between these various decisions, any possible conflict simply disappears on closer examination.

Petitioners also appear to rely on the *Metromedia* plurality's decision that government cannot permit some non-commercial speech where it bans other non-commercial speech. (Pet. 7, citing *Metromedia*, 453 U.S. at 514–15). They do not appear to contend that there is any decisional conflict on that point, however. (Pet. 9–10). Moreover, even if there were any such conflict, the Oregon decisions would be on the *Metromedia* side of the line. In its *Outdoor Media* decision, the Oregon court rejected the claim that the OMIA creates content-based distinctions. 150 Or. App. at 117.

---

[11] In *City of Ladue v. Gilleo*, 512 U.S. 43, 49 (1994)—also cited by petitioners—this Court agreed that *Metromedia* stands for the proposition that a complete ban on offsite commercial billboards is permissible.

Thus, although petitioners hint at supposed conflicts, none is apparent. The results of some of these cases may differ, due to differing provisions in the various sign laws at issue, but the analytical confusion and disagreement that petitioners suggest does not appear to exist. In particular, the Oregon decisions regarding the OMIA do not appear to conflict with this Court's decisions or with decisions from other federal appellate courts.

B. The claimed conflict with this Court's decision in *FW/PBS, Inc.*

Petitioners' final claim is that the Oregon court's decisions are in conflict with the plurality opinion in *FW/PBS, Inc.* and with a decision from the Ninth Circuit. (Pet. 10–11). Again, the claimed conflict seems to disappear when the cases are examined.

In *Outdoor Media*, the state appellate court distinguished the plurality opinion in *FW/PBS, Inc.*, and held that no time limit need be imposed on the permitting decision under the OMIA "because the OMIA's relocation and transfer provisions do not require the [state agency] to review the content of a billboard's message, nor do they represent a legislative attempt to classify and restrict speech on the basis of content." 150 Or. App. at 121. That decision does not conflict with *FW/PBS, Inc.* "The core policy" underlying decisions such as *FW/PBS* is that "undue delay [may] result[] in the unconstitutional suppression of protected speech." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990). Here, however, because the on-premises/off-premises distinction is not content-based, any delay will not result in the unconstitutional suppression of protected speech. In addition, as discussed above, the so-called "permit requirement" of the OMIA is not a permit requirement in the usual sense. Rather, the requirement represents the act's geographical and numerical limitations on

"outdoor advertising" signs. Government delay is not a factor. If a sign does not otherwise comply with the act, the only way to get a permit is to obtain one by transfer from someone else who has one.

Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993), also cited by petitioners, does not create the conflict that petitioners seek. In holding that "the failure to specify the time period for processing permit applications" was "not fatal," the court relied heavily on the fact that the appellants had "not cited one case" in support of their claim. 997 F.2d at 613.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MICHAEL D. REYNOLDS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Respondent

October 12, 2001